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In the Supreme Court of the United States

October Term, 1972

No. 72-1696

GREAT LAKES CAR DISTRIBUTORS, INC.,
Petitioner,

vs.

KIBSGARD SPORTS CAR CENTER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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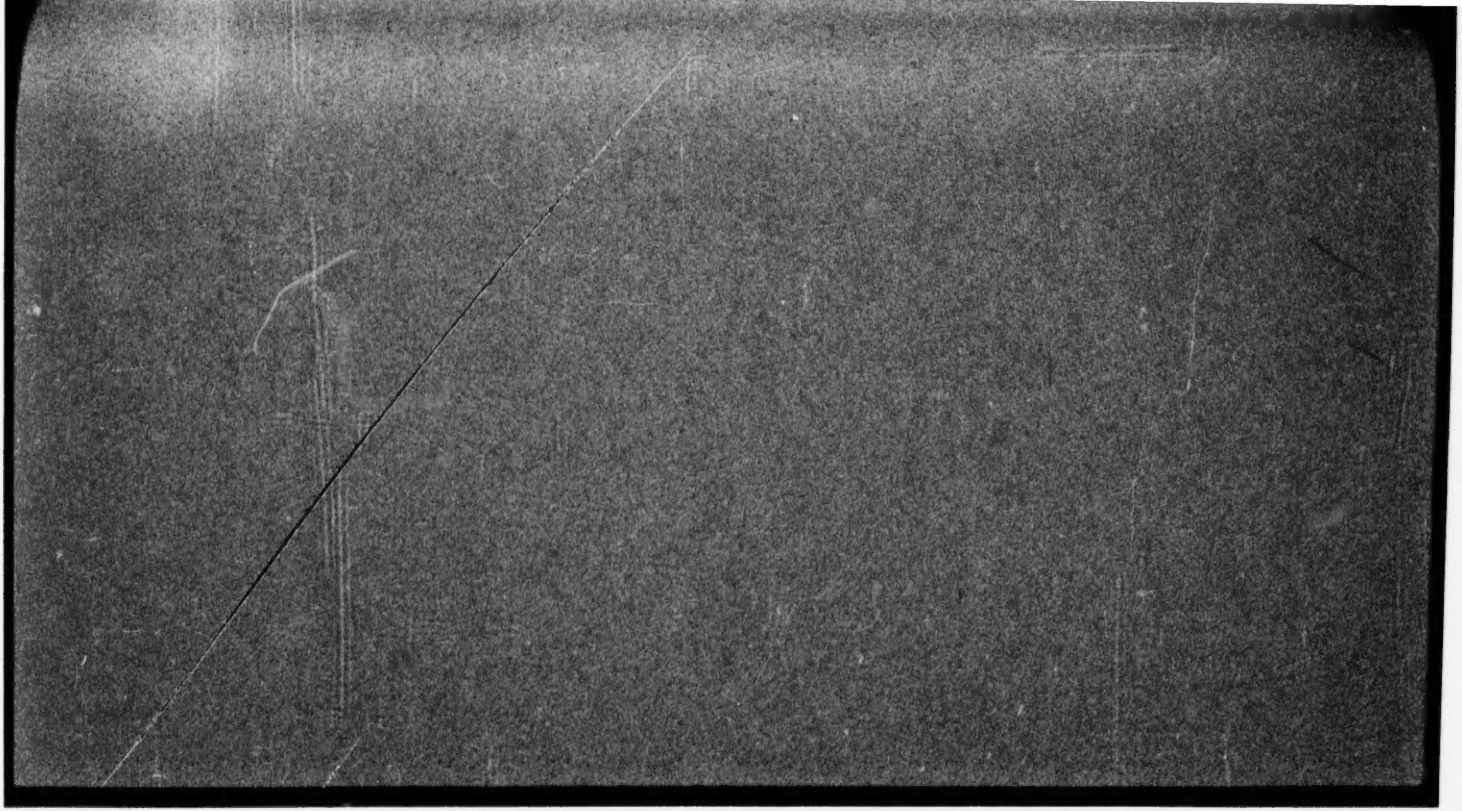

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In the Supreme Court of the United States

October Term, 1972

No......

GREAT LAKES CAR DISTRIBUTORS, INC.,
Petitioner,

vs.

KIBSGARD SPORTS CAR CENTER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Great Lakes Car Distributors, Inc., prays that a writ of certiorari issue to review the order of April 13, 1973, in which the United States Court of Appeals for the Sixth Circuit vacated the summary judgment granted herein by the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The opinion in which the District Court set forth its reasons for granting petitioner's motion for summary judgment (Appendix C, *infra*, p. 28) is not reported.

The order of the Court of Appeals vacating the summary judgment (Appendix A, *infra*, p. 25) is not reported.

JURISDICTION

The order of the Court of Appeals was dated and entered by the Clerk on April 13, 1973. 28 U.S.C. 1254(1) gives this Court jurisdiction to review the order by writ of certiorari.

QUESTIONS PRESENTED

1. Where the basic facts are not in dispute, but the parties disagree in good faith as to the inferences to be drawn therefrom, does the trial court act "improvidently" in granting a motion for summary judgment if it concludes, giving the non-movant the benefit of all reasonable inferences, that the moving party is entitled to judgment as a matter of law on basis of the facts that are not in dispute and the inferences as to which reasonable men could not disagree?

The Court of Appeals for the Sixth Circuit has held that such a summary judgment is improvident. The Sixth Circuit's position finds some support in decisions of the Fourth and Fifth Circuits.

The Courts of Appeals for the District of Columbia, Second, Third and Eighth Circuits have held that such a summary judgment is not improvident.

2. Could the case loads of the federal district courts be managed more efficiently if this Court resolved the conflict between the Sixth Circuit's " 'reluctant' approach to summary judgment," as Professor Moore has characterized it, and the more receptive approach of other circuits?

STATUTE AND RULES INVOLVED

15 U.S.C. Chapter 27, entitled "AUTOMOBILE DEALERS SUITS AGAINST MANUFACTURERS," was enacted August 8, 1956 (70 Stat. 1125). It provides, in pertinent part, as follows:

"§ 1221. **Definitions**

As used in this chapter—

(a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

* * * * *

"§ 1222. **Authorization of suits against manufacturers; amount of recovery; defenses**

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

Rule 1, Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

"SCOPE OF RULES

These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 56, Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

"SUMMARY JUDGMENT

* * * * *

"(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) **Motion and Proceedings Thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

* * * * *

"(e) **Form of Affidavits; Further Testimony; Defense Required.**

* * * * *

When a motion for summary judgment is made and supported as provided in this rule, an adverse party

may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT

Petitioner, an independent distributor of English cars, was sued by one of its dealers after the collapse of negotiations over renewal of the dealer's franchise.

The suit was brought under the Automobile Dealers Suits Against Manufacturers Act, 15 U.S.C. 1221 *et seq.*

Petitioner had declined to renew the franchise because the dealer refused to commit itself to rectifying its inadequate sales performance. While this is a proper ground for non-renewal,[1] petitioner's motion for summary judgment did not rest on that ground and did not involve the good faith of either party. The motion for summary judgment was predicated, rather, on the fact that petitioner was not acting "for and under the control of [the] manufacturer in connection with the distribution of said automotive vehicles," and thus, as a matter of law, could not be deemed an "automobile manufacturer" under 15 U.S.C. 1221(a).

The Court of Appeals conceded that "the basic facts are not in dispute . . . ." (Appendix A, *infra*, p. 25.)

The sworn affidavit of petitioner's president established, without contradiction, that:

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1. *Frank Chevrolet Co. v. General Motors Corp.*, 419 F.2d 1054 (6th Cir. 1969).

- Petitioner, a closely held Delaware corporation, was independently owned and managed and was neither the alter ego nor the agent of the manufacturer (R. 8).

- The cars (Austins and MGs) were manufactured and assembled in the United Kingdom by a British corporation known as British Leyland Motor Corporation Limited (R. 8).

- Petitioner bought the cars from an importer, a Delaware corporation known as British Leyland Motors, Inc., ("BLM"), and petitioner sold them to dealers selected solely by it (R. 7).

- All of the terms of petitioner's contract with BLM were set forth in a written agreement accompanying the affidavit (R. 7).

- That agreement expressly provided, under the caption *"No Agency Relationship,"* that petitioner was "not the agent or legal representative of BLM . . . or British Leyland Motor Corporation Limited or any of its subsidiaries or affiliates" (R. 17).

- The limited areas where petitioner was authorized to act for and under BLM's control were defined in the agreement (R. 7 & 10-18), and petitioner could not and did not act for or under the control of either BLM or the manufacturer in selecting, retaining or terminating dealers (R. 7-9).

Recognizing that there was no genuine issue as to any material fact, and that "[o]n a motion for summary judgment all inferences must be drawn in favor of the nonmovant," (Appendix B, *infra,* p. 31, quoting *R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp.,* 314 F. Supp. 681, 685 (D. N.J. 1970)), the District Court found, for rea-

sons stated in its opinion, that petitioner was entitled to a judgment as a matter of law. Petitioner's motion for summary judgment was therefore granted.

The Court of Appeals agreed that the basic facts were not in dispute, but declined to consider the merits of the contention advanced in petitioner's motion for summary judgment. Instead, citing *S. J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235 (6th Cir. 1963), *cert. denied,* 375 U.S. 824, and observing that "the parties may . . . in good faith disagree about inferences to be drawn" from the basic facts, the Court of Appeals held that summary judgment had been entered "improvidently." The judgment of the District Court was vacated and the cause remanded for further proceedings.

We seek review of the order vacating the summary judgment. Such review would permit resolution of a conflict among the Courts of Appeals as to whether the remedy of summary judgment should be withheld where the evidentiary facts are undisputed, but the parties disagree as to the conclusions to be drawn therefrom.

REASONS FOR GRANTING THE WRIT

I. This Is the Latest in an Important Line of Sixth Circuit Decisions That Conflict with Numerous Decisions in Other Circuits.

Only one case was cited by the Court below: *S. J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235 (6th Cir. 1963), *cert. denied,* 375 U.S. 824.

Groves stands for the following proposition:

> "It is often the case that although the basic facts are not in dispute, the parties in good faith may never-

theless disagree about the inferences to be drawn from these facts . . . . Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment." 315 F.2d at 237-238.

This language—repeatedly quoted or paraphrased in subsequent Sixth Circuit decisions[2]—is characterized by Professor Moore as reflecting a " 'reluctant' approach to summary judgment . . . ." 6 MOORE'S FEDERAL PRACTICE, ¶ 56.15, p. 2305 (1972 Supp. at p. 34).

The Sixth Circuit's oft-quoted dictum seems to have been *obiter*, for the court noted in *Groves* that "a direct factual issue is presented by the defendant's contention that the concrete aggregates stockpiled by the plaintiff and rejected by the defendant did not meet the specifications of the contract." 315 F.2d at 238.

The facts in *Groves* doubtless warranted a "reluctant" approach to summary judgment in any event, for the case was "not a simple one," and involved "complex facts and issues." *Id.* The appendices ran to 170 printed pages, setting forth "affidavits and excerpts from more than 1800 pages of contract documents, plans, specifications, correspondence, reports, depositions, admissions and the like." *Id.*

The *Groves* dictum has been endorsed by the Courts of Appeals for the Fourth Circuit (*American Fidelity & Casualty Co. v. London & Edinburgh Insurance Co.*, 354 F.2d 214, 216 (4th Cir. 1965)) and the Fifth Circuit (*Keating v. Jones Development of Missouri, Inc.*, 398 F.2d 1011 (5th Cir. 1968); *National Labor Relations Board v. Smith*

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2. *See, e.g., Hart v. Johnston*, 389 F.2d 239, 242 (6th Cir. 1968); *Columbus Services, Inc. v. Preferred Building Maintenance, Inc.*, 398 F.2d 80, 82 (6th Cir. 1968); *Equal Employment Opportunity Commission v. United Association of Journeymen, etc.*, 427 F.2d 1091, 1093 (6th Cir. 1970), *cert. denied*, 404 U.S. 832.

Industries, Inc., 403 F.2d 889, 893 (5th Cir. 1968); *Lighting Fixtures & Electric Supply Co. v. Continental Insurance Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969) (affirming a summary judgment); and *Cole v. Chevron Chemical Co.*, 427 F.2d 390, 393 (5th Cir. 1970)).

The Fourth Circuit has nevertheless acknowledged the usefulness of summary judgment motions in "smoking out" those cases that need not go to trial, thus permitting the conservation of "judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition." *Bland v. Norfolk & Southern R.R.*, 406 F.2d 863, 866 (4th Cir. 1969).

Neither has the Fifth Circuit been reluctant to approve judicious use of the summary judgment remedy. See, for example, *Bros, Inc. v. W. E. Grace Manufacturing Co.*, 261 F.2d 428, 432-33 (5th Cir. 1958), where the court expressed itself as follows:

> "Summary judgment is a marvelous instrument in expediting the administration of justice. It is the means by which causes or defenses with no real merit are weeded out without the hazard of a decision on an artificial situation described by artful pleadings, or without the cost in precious judicial time of a long protracted trial which ends with a determination that, on the facts viewed most favorably to a party, the claim or defense is not good as a matter of law.
>
> * * * * *
>
> As might be expected of anything so useful, there is a definite condition on its availability, a restriction on its use. No matter how enticing, it cannot short circuit a trial by judge or jury of fact questions if they are really in the case. If, on the moving papers alone or on them in conjunction with the counter affidavits it is

> shown that there actually is a genuine dispute of a significant fact . . . or there is a serious and substantial doubt about it . . . summary judgment must be denied. But if, on the other hand, there is, by a presentation of factual evidentiary details having the substantial characteristics of receivable evidence as compared with conclusions, a convincing showing that no real genuine controversy on the decisive fact exists, a mere formal denial is but a pretended one, and is insufficient. In that situation the respondent must come forward with facts of his own.
>
> * * * * *
>
> These mutual principles assure both the fullest utility to this procedural device while keeping it from ever becoming a mere wager of affidavits, a compurgation by the most paper swearers." (Citations omitted.)

While the Sixth Circuit doubtless reached the correct result in *Groves*, the proposition of law for which the case has been cited so often cannot withstand logical analysis, and is contrary to the weight of authority in other circuits.

Groves is, for example, diametrically opposed to the decision announced by Judge Wiley Rutledge, prior to his elevation to the Supreme Court, in *Fox v. Johnson & Wimsatt, Inc.*, 127 F.2d 729 (D.C. Cir. 1942). In affirming a summary judgment for the defendant in an action for specific performance of an alleged contract, the Court there declared:

> "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute.
>
> * * * * *

> Conflict concerning the ultimate and decisive conclusion to be drawn from disputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile. Judgment therefore was given properly for the defendant." *Id.* at 736-37.

The continuing vitality of *Fox*—and the clear conflict between *Fox* and *Groves*—is evidenced by the recent case of *Cody v. Aktiebolaget Flymo,* 452 F.2d 1274 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 990. In that case, speaking for the majority of a divided court, Judge McGowan gave *Fox* conclusive weight in affirming a summary judgment rendered by Judge Gesell. The dissenting Judge argued that *Fox* does not represent the prevailing view today, citing *Groves* and its progeny. (In point of fact, for the reasons stated at page 14, *infra,* the dissenting Judge appears to have misread both *Fox* and *Groves.*)

In *Otis & Co. v. Pennsylvania R.R.,* 155 F.2d 522 (C.C.A. 3rd 1946), the Court of Appeals for the Third Circuit affirmed "for the reasons stated by him" a judgment by Judge Kalodner reported at 61 F. Supp. 905 (E.D. Pa. 1945). Relying on *Fox,* Judge Kalodner had there stated:

> "The Court has before it all the facts which a formal trial would produce and since this cause came on to be heard without a jury, and there is no substantial conflict concerning the evidentiary facts, but only as to the inferences to be drawn therefrom, this is a proper case for summary judgment." 61 F. Supp. at 907.

The rule announced by Judge Rutledge in *Fox* has also commended itself to trial courts in many other parts of the

country. See, for example, *Clifton v. Ribicoff*, 195 F. Supp. 673, 674 (D. Colo. 1961) ("There is no controversy as to the basic facts of the case; the only disagreement relates to the conclusions which should be drawn therefrom. Hence, this is a proper matter to be determined on requests for summary judgment"); *Snyder v. State-wide Properties, Inc.*, 235 F. Supp. 733, 735 (N.D. Ill. 1964), *aff'd sub nom. Snyder v. Nathan*, 353 F.2d 3 (7th Cir. 1965) ("There is no genuine issue of fact, only a question of the proper inferences to be drawn from the facts below outlined; therefore it is proper for the court to pass upon the respective motions for summary judgment . . . ."); and *Northland Greyhound Lines Inc. v. Amalgamated Association etc.*, 66 F. Supp. 431, 433 (D. Minn. 1946) ("Although the parties draw different conclusions from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial.")

For a number of years, the Court of Appeals for the Second Circuit was sharply divided over the proper scope of the summary judgment remedy.[3] The confusion in the Second Circuit has now been ended, thanks largely to a series of illuminating opinions by Judge Kaufman.

In *Donnelly v. Guion*, 467 F.2d 290, 294 (2nd Cir. 1972), Judge Kaufman stated, in distinguishing two Second Circuit Decisions in which summary judgments had been reversed, that:

> "These cases properly held that although there may be no dispute as to the basic evidentiary facts, summary judgment is improper where the case stands

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3. The Second Circuit cases are analyzed in 6 MOORE'S FEDERAL PRACTICE, ¶56.15 [1.-02], pp. 2291 et seq. (2d ed. 1948) and 10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, Civil §2727, at 546-49 (1973).

> or falls on the inference that may be drawn from these facts—particularly where the inferences depend upon subjective feelings and intent. But this rule applies only where the 'undisputed evidentiary facts disclose competing material inferences as to which *reasonable* minds might disagree'." (Emphasis supplied.)

This is unquestionably what Judge Rutledge had in mind in *Fox*. See *Symposium, Federal Trials and the Erie Doctrine*, 51 NW. U. L. REV. 338, 373 (1956), where the authors explain that the confusion over the meaning of a "material fact" under Rule 56 "stems from the failure to distinguish a 'fact' from an 'inference,' the latter being merely a deduction based upon evidentiary facts." Citing *Fox* and its progeny for the proposition that "[s]ummary judgment, of course, must be denied where there is a genuine dispute as to the evidentiary facts," the authors go on to explain that "[w]here there is a conflict concerning the inferences to be drawn from undisputed evidentiary facts, summary judgment may still be granted upon a showing that the only *reasonable* inference is in favor of the moving party." *Id.* at 373-74. (Emphasis supplied.) See also, Asbill & Snell, *Summary Judgment Under the Federal Rules—When an Issue of Fact Is Presented*, 51 MICH. L. REV. 1143, 1146 (1953), where it is explained that neither party is entitled to judgment as a matter of law where "reasonable men" could differ on the inferences to be drawn from undisputed evidentiary facts. Quoting with approval from Judge Rutledge's opinion in *Fox*, the authors go on to state that "the issue of fact which prevents summary judgment should be limited to a dispute of an evidentiary fact," and "if one party is entitled to a judgment as a matter of law, a dispute as to inferences should not prevent summary judgment." *Id.* at 1147.

The dissenting judge in *Cody v. Aktiebolaget Flymo*, 452 F.2d 1274, 1288 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 990 (*supra*, p. 11), was obviously misreading *Fox* when he said that *Fox* seemed to be based upon the assumption "that where there is no dispute as to circumstantial facts, a case can be decided on summary judgment even though different inferences on crucial matters might be drawn by *reasonable* minds from the established facts." (Emphasis supplied.)

Similarly, the dissenting judge was misreading *Groves* when he cited it for the proposition that "[s]ummary judgment is precluded by conflicting inferences drawable by *reasonable* minds from undisputed material facts which if settled against the moving party would deny him a judgment." *Id.* at 1288. (Emphasis supplied.) The dissenting Judge's addition of the "reasonable minds" gloss to *Fox* and *Groves* shows that he appreciated what the rule ought to be—*vide* Judge Kaufman's opinion in *Donnelly v. Guion*, 467 F.2d 290 (2d Cir. 1972), *supra*—but he shut his eyes to what the courts had actually written in both decisions.

In *Cali v. Eastern Airlines Inc.*, 442 F.2d 65 (2d Cir. 1971), Judge Kaufman—writing for a panel that included Chief Judge Lombard and Judge Friendly—pointed out that trial courts in the Second Circuit had recently been admonished "to approach summary judgment with less trepidation than had sometimes been displayed in the past," *Dressler v. The MV Sandpiper*, 331 F.2d 130 (2d Cir. 1964), but went on to declare that "when the court grants summary judgment, it must resolve all ambiguities and draw all *reasonable* inferences favorable to the party against whom summary judgment is sought," and "[i]f undisputed evidentiary facts disclose competing material inferences as to which *reasonable* minds might disagree, the motion must be denied." 442 F.2d at 71. (Emphasis supplied.)

Such is clearly the teaching of this Court's decisions in *United States v. Diebold*, 369 U.S. 654 and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, both of which were cited by Judge Kaufman. See also *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 and *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, which were distinguished thus in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 287: "*Interstate Circuit* differs from the case at hand in precisely the same way that *Poller* does, namely, in the inferences of motive that can *reasonably* be drawn from the facts." (Emphasis supplied.)

The "reasonable minds" standard that the Second Circuit has expressly applied in its recent decisions under Rule 56, and that a majority of this Court seems to have endorsed in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 287, *supra*, is, of course, precisely the same standard that a trial judge customarily applies in ruling on a motion for a directed verdict. *Empire Electronics Co. v. United States*, 311 F.2d 175, 180 (2d Cir. 1962) (per Kaufman, J.), and *Chambers v. United States*, 357 F.2d 224, 227 (8th Cir. 1966).[4] There was a time, indeed, when the Sixth Circuit itself was prepared to say that it could "perceive no difference of principle in respect to the quantum of evidence required which distinguishes the entry of summary judgment from the direction of a verdict in favor of the defendant." *Appolonio v. Baxter*, 217 F.2d 267, 271 (6th Cir. 1954). The Sixth Circuit had evidently changed its mind by the time *Groves* was decided, however, since that case abandoned the "reasonable minds" standard

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4. But *cf. Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951), a case of questionable authority today, in which the Fourth Circuit said that summary judgment motions should normally be overruled even if the trial judge thinks he will have to direct a verdict for the moving party.

in favor of one that turns on whether there is a bona fide disagreement between the parties themselves.

The subjective standard thus adopted by the Sixth Circuit in *Groves* is particularly inappropriate where the decision on the merits of the case must depend, as in the case at bar, upon the meaning of a written contract. The interpretation of such a contract "does not raise an issue of fact as such," as the Court of Appeals for the Eighth Circuit declared in *Universal Fiberglass Corp. v. United States*, 400 F.2d 926, 928-29 (8th Cir. 1968), and there are numerous district court cases "in which summary judgment has been granted although *the parties* were not in agreement as to the meaning of the contract or its interpretation . . . ." *Id.* at 929. (Emphasis supplied.)[5]

It would be ironic if the subjective test adopted in *Groves*, where the existence of a bona fide dispute between the parties was regarded as determinative regardless of whether reasonable minds could draw different inferences from the undisputed facts, stemmed from a misreading of this Court's opinion in *Associated Press v. United States*, 326 U.S. 1. That was an antitrust case which, like the case at bar, turned on a written agreement the authenticity of which was not in dispute. In *affirming* a summary judgment, this Court observed, by way of dictum, that "[w]e agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." 326 U.S. at 6.

The *Associated Press* decision obviously did not mean that summary judgment should be withheld simply because

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5. The Court of Appeals for the Sixth Circuit, when it has focused clearly on this question, seems to have been inclined toward the same view. See, for example, *Morr v. United States*, 243 F.2d 913, 914 (6th Cir. 1957) and *Consolidated Jewelers, Inc. v. Standard Financial Corp.*, 325 F.2d 31, 35 (6th Cir. 1963).

the parties might disagree, in good faith, as to what inferences should be drawn from a written contract. This Court's recent decision in *Mourning v. Family Publications Service Inc.*, 41 U.S.L.W. 4517 (U.S., April 24, 1973) demonstrates that the summary judgment procedure lends itself very well to use in a situation where no material factual questions are presented and the case turns on conclusions to be drawn from a written contract. While four members of this Court dissented, in whole or in part, in *Mourning*, we take it that none of the dissenters would have questioned the propriety of a summary disposition if the contractual relationship between Family Publications Service and the publishers had been disclosed in the record, as well as the contractual relationship between Family Publications and the widow Mourning.

This Court has long adhered to the view that where the construction and effect of writings does not depend upon oral testimony or extrinsic facts, there is presented "a pure question of law, to be decided by the court." *Hamilton v. Liverpool, London & Globe Insurance Co.*, 136 U.S. 242, 255.

The "reluctant" approach that the Sixth Circuit endorsed in *Groves* and the line of cases following it seems totally at variance with the spirit informing the 1963 amendments to Rule 56, which became effective soon after *Groves* was decided. Those amendments were designed to overcome the numerous cases that, in the words of the Advisory Committee, had "impaired the utility of the summary judgment device." In *Dressler v. The MV Sandpiper*, 331 F.2d 130, 132 (2d Cir. 1964), decided within months after the 1963 amendments became effective, the Second Circuit, finding itself faced with "significant questions as to the proper role of the District Court in motions for summary relief," called for a change of heart on the part of the "large number of courts" that, "often expressing a fear of

'trial by affidavit,' displayed a far more restrictive attitude towards motions for summary judgment" than had those courts and commentators who viewed the summary judgment device as a useful tool for piercing "mere formal denials and allegations," and permitting the award of summary relief where the basic facts were not truly in dispute. 331 F.2d at 132. Judge Kaufman was subsequently to say of the decision in *Dressler v. The MV Sandpiper, supra,* that it had interpreted the 1963 amendments to Rule 56 "as suggesting that the courts thereafter were to approach the Rule with less reticence and more resoluteness." *American Manufacturers Mutual Insurance Co. v. American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967), *cert. denied*, 404 U.S. 1063. *Cf. Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966), where the Court stated:

> "Chief Justice Warren has observed that under the Federal Rules, 'a lawsuit is a search for the truth and the tools are provided for finding out the facts before the curtain goes up on trial.' 38 Conn. B.J. 3 (1964). The summary judgment procedure contained in Rule 56 is just such a 'tool' because it enables the court to determine if the 'curtain' should be raised at all."

See also *National Life Insurance Co. v. Silverman*, 454 F.2d 899, 909 (D.C. Cir. 1971).

Prior to his appointment to the Court of Appeals for the Second Circuit, Dean Charles E. Clark, of the Yale Law School, who had served as reporter to the Advisory Committee that drafted the Federal Rules, observed that:

> "The great impetus for adoption of the [summary judgment] procedure generally in this country seems to have come from an unheralded rule of court in

> New York in 1921, which followed the English model. This rule (Rule 113) proved so effective in speeding up the calendar that it drew to its support able jurists and writers who have provided leadership for its extension in New York and elsewhere throughout the country." Clark, *Summary Judgments and a Proposed Rule of Court*, 25 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, 20, 20-21 (1941).

Judge Shientag, of the Appellate Division of the New York Supreme Court, noted almost 40 years ago that:

> "[t]he remedy of summary judgment has demonstrated its worth as a prompt, business-like and inexpensive method of disposing of a substantial amount of litigation. There is no more effective weapon in the arsenal of legal administration." Shientag, *Summary Judgment*, 4 FORD. L. REV. 186 (1935).

Summary judgment can hardly be an "effective weapon in the arsenal of legal administration" if it is spiked by the kind of decisions that *Groves* and its progeny have encouraged in the Sixth Circuit.

The Sixth Circuit test of a subjective disagreement between the parties about the inferences to be drawn from the undisputed facts finds no support in the language of Rule 56 or in its history. In view of the historical connection between Rule 56 and Rule 113 of the New York Rules of Civil Practice, moreover, it is interesting to note that when the New York rule was amended in 1933 to permit the defendant to take advantage of the summary judgment procedure, it was required that a motion for summary judgment be supported by an affidavit setting forth "the belief of the *moving party* either that there is no defense to the action or that the action has no merit as

the case may be." 4 FORD. L. REV. at 188 & 202. When the Federal Rules of Civil Procedure were first adopted five years later, no such requirement was imposed. The reason, we venture to suggest, is that the draftsmen of the Federal Rules recognized from the very outset that the subjective belief of a party as to the merits of his case is irrelevant, regardless of how high the degree of "good faith" with which such belief is held.

The Supreme Court of Ohio, which has been trying for some time to devise practical methods for handling the growing volume of litigation with fairness and dispatch, has taken a dim view of the trepidation with which some judges approach every motion for summary judgment. Speaking of Ohio's summary judgment procedure, the Ohio Supreme Court has said that "the desirability of its aims are so apparent that its use should be encouraged in proper cases." *North v. Pennsylvania R.R.*, 9 Ohio St. 2d 169, 171, 224 N.E.2d 757, 760 (1967). The Court then said:

> "With this in mind, appellate courts reviewing orders allowing motions for summary judgment should require the appellant, upon whom the duty of demonstrating prejudicial error rests, to define with great specificity the area in which a factual dispute exists, and *this court should review as of public or great general interest doubtful reversals in this area.*" *Id.* (Emphasis supplied.)

This Court, we earnestly submit, should do no less.

II. The Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Writing in the OHIO STATE LAW JOURNAL, Judge Clark, of the Second Circuit, observed that:

> "[t]he process of judicial interpretation is sure to bring interpretations of the rules which in process of time mark a departure, usually by slow degrees, from the original intent of the rules. It is the nature of all procedure to harden and solidify, to become increasingly 'red tape.'
>
> * * * * *
>
> "By what I have ventured to call a Gresham's Law of Procedural Precedents, the technical and the strict in due course drives out the liberal and the flexible." Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241, 244-45 (1953).

This is precisely what has happened in the Sixth Circuit in connection with Rule 56. The Sixth Circuit doubtless reached the correct result in *Groves*, but in rationalizing that result it created, "as a shortcut to doing justice in a particular case,"[6] a rule the inevitable tendency of which, in Judge Clark's telling phrase, is to "drive out the liberal and flexible." 14 Ohio St. L.J. at 245.

In *Groves* the Sixth Circuit reached the right result on the wrong reasoning. In the case at bar the Sixth

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6. CLARK, CODE PLEADING, 71 (2d ed. 1947), quoted in Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839, 850 (1956).

Circuit assumed *Groves* means what it says, and, correctly applying what *Groves* says to a quite different factual context, reached a result that is patently indefensible.

This case is a model of simplicity. The record is neither long nor complex. The basic facts are admittedly undisputed. A pure question of law is presented on the merits. The Sixth Circuit declined to address the merits, but the District Court had no such trepidation. For the reasons stated in the short briefs we filed in the trial court in support of our motion for summary judgment (R. 19-28 & R. 40-43), we submit that the trial court's decision on the merits was correct and should be affirmed by this Court.

CONCLUSION

Standing alone, the fact that the order of the court below would require the District Court to impanel a jury and devote several days to a trial that will culminate in a directed verdict for petitioner is not terribly important. In view of the growing demands on the time of all District Courts, however, and in view of the erosion in the quality of justice that inevitably occurs when overworked trial judges cannot devote the time they should to the cases that must be tried, perhaps this Court ought to be concerned if any Court of Appeals is discouraging use of the summary judgment remedy in situations where its use would make sense.

The Court of Appeals for the Sixth Circuit has led practitioners in that Circuit to think that motions for summary judgment are generally a waste of time, unless the case happens to have been assigned to a trial judge

who enjoys a truly outstanding reputation.[7] For all of the foregoing reasons, we submit that the petition for certiorari should be granted, and, upon review, the order of the Court of Appeals should be vacated and the judgment entered by the District Court should be reinstated.

Respectfully submitted,

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Counsel for Petitioner

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7. See *Frank Chevrolet Co. v. General Motors Corp.*, 304 F. Supp. 307 (N.D. Ohio 1968), where Judge William K. Thomas, in granting summary judgment in favor of an automobile manufacturer that had refused to renew a dealer's franchise because of deficient sales performance, held that as a matter of law the manufacturer had acted "in good faith in . . . not renewing the franchise." The Court of Appeals for the Sixth Circuit affirmed the judgment "[f]or the reasons and upon the authorities set forth in the comprehensive published opinion of the District Juldge. . . ." 419 F.2d 1054, 1056 (6th Cir. 1969).

APPENDIX A

Order of the Court of Appeals

(Filed April 13, 1973)

No. 72-2215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KIBSGARD SPORTS CAR CENTER, INC.,
Plaintiff-Appellant,

vs.

GREAT LAKES CAR DISTRIBUTORS, INC.,
Defendant-Appellee.

ORDER

Before: PECK, McCREE and MILLER, Circuit Judges.

This cause having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises that although the basic facts are not in dispute, the parties may nevertheless in good faith disagree about inferences to be drawn therefrom (*S. J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235 (6th Cir. 1963)), and it is therefore concluded that summary judgment for the defendant appellee was improvidently entered. Accordingly,

IT IS ORDERED that judgment of the District Court be and it hereby is vacated, and the cause is remanded

to the District Court for further proceedings not inconsistent herewith.

Entered by Order of the Court

/s/ JAMES A. HIGGINS
Clerk

APPENDIX B

Order of the District Court

(Filed October 3, 1972)

No. C71-353

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

KIBSGARD SPORTS CAR CENTER, INC.,
Plaintiff,

vs.

GREAT LAKES CAR DISTRIBUTORS, INC.,
Defendant.

ORDER

This cause came to be heard upon motion of the defendant for summary judgment in its favor. For the reasons stated in the accompanying opinion, good cause therefor appearing, it is

ORDERED that the motion of the defendant for summary judgment in its favor should be and hereby is granted, and it is

FURTHER ORDERED that judgment should be and hereby is entered in favor of the defendant.

/s/ WM. J. YOUNG
United States District Judge

Toledo, Ohio

APPENDIX C

Opinion of the District Court

(Filed October 3, 1972)

Civil No. C 71-353

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

KIBSGARD SPORTS CAR CENTER, INC.,
Plaintiff,

VS.

GREAT LAKES CAR DISTRIBUTORS, INC.,
Defendant.

OPINION

YOUNG, J:

This is an action brought by an automobile dealer which arises out of the termination of a franchise agreement between defendant and itself. The action is brought under the Automobile Dealers' Day in Court Act, 15 U.S.C. §1221, *et seq.*

Plaintiff is an automobile dealer and had a franchise with defendant for the purpose of selling certain British automobiles. Defendant is a distributor of these motor vehicles in Ohio and several other states. It appears that defendant purchases these vehicles from British Leyland Motors, Inc. (hereinafter BLM-USA), a Delaware corporation, which has the exclusive right to market such

vehicles in the United States. BLM-USA is in turn a distributor for British Leyland Motors, Ltd. (hereinafter BLM-UK), a British corporation. BLM-UK is the manufacturer of the automobiles which are the subject of the franchise, and it seems that they are manufactured entirely in the United Kingdom.

Defendant has now moved for summary judgment in its favor on the ground that it is not an automobile manufacturer and consequently, 15 U.S.C. §1221, *et seq.* creates no right of action against it. Section 1221 provides in relevant part:

> "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in . . . not renewing the franchise with said dealer . . . ."

Section 1221 defines the term "automobile manufacturer" as:

> "(a) . . . any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles."

The phrase, "acts for and is under the control of" has been interpreted to include not only subsidiaries of the manufacturer but in general, those who are in an agency relationship with the manufacturer to an extent whereby the manufacturer as a principal could exercise control over the agent, contractually, or otherwise, even though it

never actually exercised such control. *Volkswagen Interamericana, S.A. v. Rohlsen,* 360 F.2d 437 (1st Cir. 1966).

Defendant in this case has contended that not only is it not a manufacturer but that it is a completely separate entity over which neither BLM-USA nor BLM-UK exercised any control and that it was not an agent for either for any purpose. The question thus posed is whether plaintiff has a cause of action against defendant under 15 U.S.C. §1221 on an agency theory since it is undisputed that defendant is not a manufacturer.

This is not an entirely novel question and although there is not a plethora of cases on this point, it does appear that the same question was decided in *R.A.C. Motors, Inc. v. World-Wide Volkswagen Corp.,* 314 F. Supp. 681 (D. New Jersey 1970). In that case the Court stated at page 685:

> "Volkswagen Aktiengesellschaft is the German corporation which manufactures the Volkswagens. Volkswagen of America, Inc., is a New Jersey corporation which imports to the U. S. the Volkswagens and then sells them to various distributors throughout the country including defendant World-Wide. Neither Volkswagen Aktiengesellschaft or Volkswagen of America have any direct dealings with the plaintiffs. Summary judgment must also be granted in favor of these defendants. Plaintiffs have produced no evidence which even remotely connects these defendants to this controversy. Plaintiffs contend that further proceedings in this case may reveal facts linking these defendants with the non-renewal of R.A.C.'s franchise. On summary judgment a plaintiff cannot rest on an ignorance of the facts but must obtain from discovery or otherwise information which it should seek

to amplify or test by further discovery. (citation omitted) On a motion for summary judgment all inferences must be drawn in favor of the non-movant. However, the non-movant cannot withhold evidence until the date of trial and, unless it is shown by some admissible evidence that there is a genuine issue as to a material fact, summary judgment must be granted as it must be in this case."

In the case at bar, the Court has before it the manufacturer-distributor agreement, the distributor-dealer agreement and an affidavit of the President of the defendant. Plaintiff has offered no further evidence to show that either BLM-USA or BLM-UK exercised or was capable of exercising any control over defendant's termination of a dealership. This Court concludes from the agreements and the affidavit that there was not the requisite agency relationship present between the defendant and either BLM-USA or BLM-UK to confer a cause of action upon plaintiff under 15 U.S.C. §1221 *et seq.* The motion of the defendant for summary judgment will, therefore, be granted and an order will be entered in accordance with this opinion.

/s/ WM. J. YOUNG
United States District Judge

Toledo, Ohio.

AUG 8 1973

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1696

GREAT LAKES CAR DISTRIBUTORS, INC.,
Petitioner,

vs.

KIBSGARD SPORTS CAR CENTER, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1696

GREAT LAKES CAR DISTRIBUTORS, INC.,
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vs.

KIBSGARD SPORTS CAR CENTER, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the District Court nor the order vacating the summary judgment by the court of appeals is reported. They are set forth in Petitioner's Brief, Appendix C, p. 28, Appendix A, p. 25.

JURISDICTION

The court of appeals order was directed (?) April 13, 1973. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATUTES AND RULES INVOLVED

15 U.S.C. Chapter 27, entitled "AUTOMOBILE DEALERS SUITS AGAINST MANUFACTURERS," was enacted August 8, 1956 (70 Stat. 1125). It provides, in pertinent part, as follows:

"§ 1221. **Definitions**

As used in this chapter—

(a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

* * * * *

"§ 1222. **Authorization of suits against manufacturers; amount of recovery; defenses**

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

Rule 56. Summary Judgment

"(e) Form of Affidavits; Further testimony; Defense required. Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

QUESTIONS PRESENTED

1. Whether the trial court acted improvidently in granting a motion for summary judgment where the parties disagree in good faith as to the inferences to be drawn from the facts.

2. The Court of Appeals for the Sixth, Ninth, Fourth, Tenth and Eighth Circuits have held it improvident.

STATEMENT

Respondent alleged a violation of Title 15, U.S.C., Section 1221, et seq. It is a corporation engaged in selling new and used cars in Hancock County, Ohio. Petitioner, a Delaware Corporation, is the authorized distributor of new motor vehicles manufactured by the British Leyland Motors, Inc. It entered into a number of franchise agreements with Respondent over a period of years for the selling of its Austins, Jaguars, M.G.'s, Rovers, Land Rovers and Triumphs.

The last such franchise agreement between the parties expired September 30, 1970.

Respondent charged defendant with bad faith in failing to renew its franchise agreement.

Petitioner, generally, admitted the agreement and the relationship of the parties, but denied breach or any exercise of bad faith. It alleged that Respondent refused to accept a new distributor-dealer agreement and, the Plaintiff was guilty of bad faith in its transaction with defendant.

Petitioner filed a motion for summary judgment based upon the fact that it was not a manufacturer or assembler of motor vehicles and was not acting for or under the control of any such manufacturer within the meaning of Title 15, U.S.C., Section 1221, et seq. The trial court found that there was no agency relationship between petitioner and the manufacturer of the motor vehicles to confer a cause of action on the respondent under Title 15, against the petitioner under the franchise agreement, as it was not under the control nor did it act for the manufacturer.

Petitioner, in support of the motion, filed an affidavit which contained conclusions of Affiant as to the status between the petitioner and the B. L. M. Distributor. It also attached a copy of the agreement to the Affidavit.

That agreement in and of itself provided what British Leyland Motors Inc., (BLM) could do by way of control.

Among other things, petitioner, an exclusive distributor for a specific geographical area, was required to submit orders on BLM forms, to abide by prices fixed by BLM; to accept motor vehicles at a port of entry designated by BLM; was required to maintain comprehensive inventory of parts acceptable to BLM; it had to supplement its stocking program of parts as required by BLM; was to appoint dealers in the area satisfactory to BLM; BLM had the right to visit dealers and inspect premises; BLM provided all forms used by petitioner; was required to maintain a staff and faculty satisfactory to BLM; BLM specified service procedures to be followed by petitioner; was required to maintain records and BLM had the right to inspect and audit.

It would be hard not to conclude that there was no agency or control which would fall within the definition of Title 15, Section 1221 (a).

The United States Sixth Circuit Court of Appeals

vacated the trial court's ruling, on the basis of *S. J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235 (6th Cir. 1963). *cert, denied,* 375 U.S. 824.

ARGUMENT

The Sixth Circuit said in the Groves case:

> "It is often the case, that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was, as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist, should be drawn from such facts. Under such circumstances, the case is not one to be decided by the trial judge on a motion for summary judgment" 315 Fed. 2d 237, 238.

The court further stated:

> "This court has on several occasions, expressed the view that a trial judge should be slow in disposing of a case of any complexity on a Motion for Summary Judgment, while such a judgment wisely used is a praise worthy and time saving device, if such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one."

In addition to a long series of cases in the Sixth Circuit, the same standard of deciding motions for summary judgment has been used and approved in the Ninth Circuit, *Cameron v. Van Couver Plywood,* 266 F.2d 535 (1959); the Fourth Circuit, *Girard v. Gill,* 261 F.2d 695 (1958); *Stevens v. Howard Johnsons,* 181 F.2d 390 (4th Cir. 1950); and the Tenth Circuit, *United States v. Kansas Gas & Electric,* 287 F.2d 601 (1961); Eighth Circuit, *Sev-*

erson v. Fleck, 251 F.2d 920 (1958), and the *Oral Trading v. Texas Refining*, 201 F. Supp. 846, Southern District of New York (1962).

Since the *Groves* case, the Sixth Circuit has followed that opinion in *Hart v. Johnson*, 389 F.2d 239, 242 (1968); *Columbus Services, Inc. v. Preferred Building Maintenance, Inc.*, 398 F. 2d 80, 82 (1968), *Equal Employment Opportunity Commission v. United Association of Jurymen, etc.*, 427 F.2d 1091, 1093 (1970), *cert. denied*, 404 U.S. 832.

In *Associated Press v. United States*, 326 U.S. 1, 6 (1945), this Court said:

> "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."

Also, to the same effect, *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620 (1944), which was cited and relied upon by the Sixth Circuit in the *Groves* case.

There has always been conflict in the application of a standard to be applied in ruling on a motion for summary judgment under Rule 56. Some courts have placed emphasis upon different aspects of this rule. Judge Frank of the Second Circuit in *Arnstein v. Porter*, 154 F.2d 464 (1946), along with Learned Hand, put emphasis upon the value of a trial on the merits and the importance of oral testimony where the Judge and the Jury can assess the value of testimony. He further cautioned that the court should be reluctant to dispose of the case by means of "trial by affidavit", and that evidence may be presented in a trial which would change the entire complexion of the case from the way in which it appears on motion for summary judgment. Rule 56 was not designed to preclude plaintiff the privilege of examination of defendant at trial, especially as to matters peculiar with the defendant's knowledge.

which is the case here inasmuch as the relationship between the petitioner and BLM is one that is suspect, especially in view of the self serving affidavit of its president.

It is obvious, from the requirements in the contract between BLM and petitioner, that there are strong inferences to be drawn therefrom as to whether or not there was any control or agency. It is for this reason, that the Sixth Circuit reversed the trial court and felt that this case should be tried on its merits with the availability of cross-examination, appearance of witnesses, and, not a trial by paper.

We see no real inconsistency in the application of Rule 56 among the various circuits inasmuch as it would appear that each case is decided on its own set of facts.

The only relief which is available to respondent is based upon the franchise agreement to sell new cars. BLM is a complete stranger to plaintiff. If respondent does not have the right to try this case and to show that there is a relationship between the petitioner and its supplier then Title 15, Sections 1221, et seq., are thwarted. Respondent would be deprived of his cause of action simply because of the insertion of a second so-called distributor between the manufacturer and the petitioner.

The rationale of the petitioner's Brief and citations and his conclusions based thereon, is simply that Respondent's case is without any merit at all, and that it eventually will culminate in a directed verdict for the petitioner. It reasons that it is simply expedient to dispose of this case because of growing demands on the court system. This is not a valid reason for granting a motion for summary judgment. The action of the Sixth Circuit does not discourage use of the motion for summary judgment in a proper case.

CONCLUSION

It is respectfully suggested that there are no compelling reasons for granting the Writ of Certiorari and that said petition should be dismissed.

Respectfully submitted,

ROBERT W. BOUGHTON
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